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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 669.

United States of America,

Appellant,

vs.

Elgin, Joliet & Eastern Railway Company,

Appellee.

On Appeal From the District Court of the United States for the Northern District of Illinois

BRIEF FOR APPELLEE.

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October Term, 1935.

No. 660.

United States of America,
Appellant,

vs.

Elgin, Joliet & Eastern Railway Company,
Appellee.

On Appeal From the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLEE.

Jurisdiction.

The Government invokes the jurisdiction of this Court under U. S. C. A., Title 49, Section 45, and Title 28, Section 345, to review a decree of the District Court for the Northern District of Illinois, Eastern Division, entered on the 28th day of August, 1935, dismissing the Government's bill for want of equity. [R. 512.]

Opinions and Findings.

The opinion of the District Court [R. 500] is reported in 11 Fed. Supp. 435. The formal Findings of Fact and Conclusions of Law will be found at page 497 of the record.

Purpose of the Suit and Statute Involved.

The suit was brought to enjoin the appellee, a subsidiary of the United States Steel Corporation, from transporting certain commodities produced and owned by manufacturing and producing subsidiaries of said corporation on the ground that such transportation was in violation of Section 1 (8) of the Interstate Commerce Act (34 Stat. 584; 49 U. S. C. A. 1 (8),) commonly known as the Commodities Clause, reading as follows:

> "It shall be unlawful for any railroad company to transport from any State, Territory or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Questions Involved.

The contention of the Government on the trial was that, despite the undisputed fact that the appellee did not own or have any interest in and had no voice in the production of the commodities transported, the admitted fact that the United States Steel Corporation owned all of the stock of the appellee and all of the stock of the manufacturing and producing subsidiary corporations whose products were transported by the appellee, plus the alleged fact that through certain domination and control exercised by the United States Steel Corporation and the commingling of the affairs of the appellee and its other subsidiaries with its own affairs, the separate corporate existence of the appellee and the manufacturing and producing subsidiaries was obliterated and that thus the case was brought within the Commodities Clause. The District Court in its opinion stated the contention of the Government thus:

> "The question presented is, therefore, a narrow one. It is contended that the defendant comes within the prohibition of the Statute because the Steel Corporation has exercised such management, domination, control, direction and coordination over the defendant and the producing and manufacturing subsidiaries of the Steel Corporation, as to establish in the defendant an 'interest, direct or indirect', in the articles or commodities transported. In other words, it is contended that the Steel Corporation has exercised such domination and control over both the defendant and the producing and manufacturing subsidiaries as to destroy the separate corporate entities and to reduce all corporations to one."

Since the Government does not now question the finding of the District Court that "The existence and free functioning of defendant as a common carrier railroad corporation and a separate corporate entity was not destroyed or obstructed or interfered with by the United States Steel Corporation", [Finding 3, R. 497] and since the Government has recognized the appellee as a distinct corporate entity by making it the sole party defendant, it no longer makes that claim.

The Government now, for the first time in this Court, advances two propositions:

(1) The mere fact that the United States Steel Corporation owns the stock of the appellee and also the stock of its manufacturing and producing subsidiaries, gives the appellee an interest in the commodities owned by the producing companies within the meaning of the Commodities Clause.

(2) The appellee, although having a *bona fide* separate administration of its own, is so dominated, supervised and directed by the United States Steel Corporation as to be a mere agent, department, branch or instrumentality of the latter, and that thereby it acquires an interest in the products of the producing and manufacturing subsidiary corporations transported by it.

The Government states the questions in somewhat different language, but if we understand its position, the foregoing correctly states the position which it must take since it does not question the findings of the District Court establishing the *bona fide* separate administration of the affairs of the appellee by its own management.

Statement of the Case.

The Elgin, Joliet & Eastern Railway Company is a belt railroad around the city of Chicago. It extends from Porter, Indiana, near the south end of Lake Michigan, westerly to Joliet, Illinois, and thence northerly and northeasterly to Waukegan, Illinois, north of Chicago on Lake Michigan. It has a branch leading to South Chicago located southeast of Chicago and on Lake Michigan, and to Gary located still farther east and on Lake Michigan. It crosses and connects with every railroad entering the city of Chicago. It is commonly called the Chicago Outer Belt Line. The map, Exhibit 14, opposite page 406 of the record, shows the location.

The Illinois Steel Company has steel plants located at South Chicago, Gary and Joliet, those at South Chicago and Gary being among the largest in the world. Iron ore is smelted at these plants and heavy steel articles such as rails, beams, plates, rods, bars and billets are produced. The American Bridge Company, the American Sheet and Tin Plate Company and the National Tube Company have plants at Gary. The American Steel and Wire Company has plants at Joliet and Waukegan. The Cyclone Fence Company has a plant at Waukegan. These companies are all subsidiaries of the United States Steel Corporation and are engaged in businesses indicated by their names. They obtain the steel out of which their products are manufactured from the plants of the Illinois Steel Company above referred to. [R. 81-84.]

The Elgin, Joliet & Eastern Railway Company connects the said plants with one another, and also supplies them with rail connection with each of the trunk line railroads entering the city of Chicago. Its function is to transport

semifinished products between said plants, products—mainly raw materials—between interchange points with the trunk line railroads and said plants, and finished products from the plants to said interchange points where they enter the streams of commerce. [R. 510.] That constitutes 60% of its business. [R. 90.] It also performs similar service for other shippers located on its line, and serves as an interchange between trunk lines. The latter constitutes the remaining 40% of this business. [*Id.*]

Mr. Banks, the president of the appellee when suit was brought; Mr. Filbert, the comptroller of the United States Steel Corporation when suit was brought; Mr. Chessman, chief clerk in the accounting department of the appellee, and Mr. Rogers, formerly vice president, at the time of the trial the president of the appellee, all testified, among other things, to the effect that no one connected with the Steel Corporation or its producing subsidiaries, had anything to do with the operation of the railroad, and that its affairs were administered by its own management, separate and distinct from the affairs of the Steel Corporation and its other subsidiaries. [R. 120, 95-96, 62-63, 43-44.]

We here set forth in full, for the convenience of the Court, the formal findings of fact and conclusions of law, since they are brief:

> "1. The defendant has not transported in Interstate Commerce any article or commodity (other than timber and the manufactured products) which actually, as a matter of fact, was manufactured, mined, or produced by it or under its authority or which actually, as a matter of fact, was owned in whole or in part by it or in which it actually, as a matter of fact, had an interest direct or indirect except such articles

or commodities as were necessary and intended for its use in the conduct of its business as a common carrier.

2. The primary business of defendant is that of a common carrier. Its other acts and transactions were incidental to its primary business of transportation. The United States Steel Corporation never took any part in transporting any commodities over the railroad of the defendant or in operating or in managing the operation of defendant's railroad or of any of the facilities of such operations or gave any directions or exercised any control over the transportation conducted over the railroad of defendant or took any part in any of the transactions between the defendant and the shippers over its railroad.

3. The existence and free functioning of defendant as a common carrier railroad corporation and a separate corporate entity was not destroyed or obstructed or interfered with by the United States Steel Corporation, neither was the public recognition of defendant as a common carrier railroad company concealed, obscured, or given any particular character to distinguish it from other common carrier railroads by anything done by the United States Steel Corporation.

4. All communications and conferences between representatives of the United States Steel Corporation and representatives of defendant whether properly characterized as orders, requests, advice, or the exercise of control, and whether originating with the United States Steel Corporation or with defendant, related solely to the internal affairs of the defendant and to the relations between United States Steel Corporation and defendant, and did not relate to the transaction by defendant of its transportation business or the relation between the defendant and those for which it performed transportation business.

5. Defendant regularly filed and published tariff rates covering the transportation services performed by it in accordance with the provisions of the law. In the conduct of its transportation business defendant did not discriminate against or in favor of any of its patrons either in service or in charges, but treated all alike and in accordance with its filed and published tariffs.

6. The defendant did not contribute any property or labor or exercise any authority in, or take any part in manufacturing, mining or producing any of the commodities transported by it or own, in whole or in part, or acquire any interest direct or indirect in any of the commodities transported by it (other than timber and the manufactured products thereof and such articles and commodities as were necessary and intended for its use in the conduct of its business as a common carrier).

7. All transactions and communications between United States Steel Corporation and defendant were carried on in the form of transactions and communications between two separate and distinct corporations and in such transactions and communications neither the two corporations nor their affairs were merged or mixed.

8. Defendant conducted all of its affairs in its own name for itself and in the manner and form of a corporation.

9. The United States Steel Corporation did not conduct for defendant any of its business affairs between defendant and any other persons or corporation, but defendant conducted all of its business affairs through and by its own officers and employees and not through, or by anyone acting as an officer or employee of the United States Steel Corporation.

10. Neither the President, Secretary, Treasurer, Manager, or Superintendent of defendant nor any of its executive or managing operatives is an officer of or employee of the United States Steel Corporation.

11. Whenever any information concerning the affairs of defendant or any other action by defendant was desired by United States Steel Corporation, the United States Steel Corporation never obtained such information or took such action directly by its own officers or agents, but always made request for such information or action through the officers of defendant, in the way which is customary and usual between corporations which are separate and distinct corporations.

12. Neither the money, accounts, or properties of defendant were commingled with the moneys, accounts, or properties of United States Steel Corporation, but the moneys, accounts and properties of each company were kept separate and distinct from the moneys, accounts and properties of the other and the identity and integrity of the moneys, accounts and properties of each company were preserved without any mixture, commingling, or confusion."

"CONCLUSIONS OF LAW.

1. On the facts stated in the foregoing findings of fact the Elgin, Joliet and Eastern Railway Company as a matter of law is not guilty of violating section 1 (8) Interstate Commerce Act, 34 Stat. 584, U. S. C., Title 49, Section 1 (8), herein referred to as the Commodities Clause of the Interstate Commerce Act.

2. The mere ownership of all of the stock of an industrial corporation by a railroad company, or of

the stock of a railroad company by an industrial corporation, or of the stock of both a railroad corporation and an industrial corporation by a holding corporation does not create a violation of said Commodities Clause of said Interstate Commerce Act even when such railroad corporation transports in interstate commerce commodities produced or owned by such industrial corporation.

3. The transportation in interstate commerce by a railroad corporation whose stock is owned by an industrial corporation, of commodities produced or owned by such industrial corporations, is not a violation of said Commodities Clause of said Interstate Commerce Act, but is sanctioned by, and subject to regulation under Section 15 (13) of said Interstate Commerce Act." [R. pp. 497-499.]

The Government's only criticism of those Findings is that they are extremely general. Of course, the Findings were directed to the contention actually made by the Government on the trial. They state the ultimate facts. The Government requested voluminous findings, mostly of evidence. [R. 442-480.] They were not adopted by the Court. [R. 499.]

The Government does not contend that the corporate structure involved was availed of as a device to violate the Anti-Trust laws, the Commodities Clause of the Interstate Commerce Law or any other law. It does not contend that there was any *mala fides* in the acquisition and ownership of the Appellee by the United States Steel Corporation. It no longer contends that the Appellee is not a separate and distinct legal entity or that there has

not been a *bona fide* separate administration of its affairs. The District Court said:

> "The acquisition of the stock of defendant grew out of an important business need. It served a legitimate economic purpose. The record is devoid of any evidence from which an inference could be drawn that the stock was acquired with the intent and purpose to avoid either the Anti-Trust Laws or the Commodities Clause." [R. 510.]
>
> * * * * * * * * *
>
> "But no single piece of evidence, taken alone, nor all taken together and considered as a whole, warrant the inference that the defendant and the producing and manufacturing subsidiaries are under the domination, control, direction and management of the Steel Corporation in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant has any interest, direct or indirect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation." [R. 511.]

The Appellee is an industrial railroad as defined by the Interstate Commerce Commission. [1910 24th Annual Report of I. C. C., p. 33, Ex. 29-a, R. 205.] It was acquired by the United States Steel Corporation in 1901 when the latter was organized. [R. 26.] The Hepburn Act containing the Commodities Clause amendment was passed in 1906. The suit was brought in November, 1930, nearly 25 years later. [R. 1.]

Summary of Argument.

It will be noted that Appellee's argument is not at all what Appellant says that it is. Appellee's position before the District Court was the same as it is here.

The essence of Appellee's argument is this:

Appellant seeks in this proceeding to enjoin Appellee, a common carrier, from transporting certain commodities because, as Appellant alleges, Appellee is violating the so-called Commodities Clause of the Interstate Commerce Act. That Statute prohibits a railroad company from transporting commodities, if such commodities are "produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." The proceeding cannot be maintained unless Appellee is violating the Commodities Clause. There is no other ground for the proceeding.

It was proved at the trial and is stated in the Court's findings, which are not challenged, that Appellee was not transporting commodities which were produced by it, etc. With those facts established, Appellee contends that the case ends.

Appellant argues that notwithstanding the facts stated in the Court's findings, this Court ought to adopt the fiction that Appellee does what in fact it does not do. Appellant's argument consists in presenting reasons why

the Commodities Clause should be distorted from the meaning conveyed by the simple and natural meaning of the words used.

Beyond a plea that the Statute be interpreted in accordance with the natural meaning of the words of the Statute, Appellee's argument is directed against the fallacies of Appellant's theories.

That the Commodities Clause means just what appears on its surface and does not apply to the business carried on by Appellee is shown in many ways. It is shown by comparing it with other provisions of the same Statute. It is shown by the proceedings in Congress when the Statute was under consideration, particularly by the rejection by Congress of an amendment which would have made the Statute apply to situations such as shown by the evidence in this case. The purpose of the Statute, it is shown, is in accordance with the language of the Statute, no more, no less. Furthermore, the authorities whose duties require them to enforce the Statute have, during many years, held that the Statute means just what appears on its face. This includes the Interstate Commerce Commission and several Attorneys General. Congress itself has taken the same view.

The previous decisions of this Court are analyzed and discussed. The theories deduced by the Appellant from those decisions are controverted.

The United States Steel Corporation owns the stock of Appellee. The evidence shows that it evinced its interest in Appellee in various ways. Appellant presents the facts bearing on the relation between the two companies at great length. Appellee points out in this connection that the Interstate Commerce Act, including the Commodities Clause, is directed to the transportation services performed by common carriers. Its field is such transportation services. Its purpose is not the prevention or regulation of the internal affairs of common carriers. Its concern is the relation between carriers and the shipping public. Appellee therefore contends that the incidents which Appellant presents at such great length are irrelevant to any issue in this case. They relate only to the internal affairs of Appellee. The evidence and the findings of the District Court show that the United States Steel Corporation does not interfere in any way with the operation by Appellee of its railroad. Appellee operates its railroad and serves the several subsidiaries of the United States Steel Corporation and the shipping public independently and freely and to the entire satisfaction of everyone concerned. Appellee has been guilty of no wrong and has violated no public policy against the Commodities Clause or against any Statute.

ARGUMENT.

I.

The Instant Case Is Not Within the Letter or the Spirit of the Commodities Clause.

(1) The language of the Statute.

To focus attention upon its plain and unambiguous language, we again quote the Statute:

> "It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

This Court, commenting upon the Commodities Clause (*U. S. v. Delaware & Hudson Co.*, 213 U. S. 366, 408), said:

> "Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part, and, 4, in which it has an interest, direct or indirect."

It now being established by unchallenged findings that the Appellee is a separae and distinct legal entity, and that it maintains a *bona fide* separate and distinct administration of its own affairs, it is plain that applying those four tests, 1, the Appellee has not manufactured, mined or produced the commodities transported by it; 2, they were not mined, manufactured or produced under its authority; 3, it did not own them in whole or in part; 4, it had no interest, direct or indirect, in them.

Had the Government succeeded in establishing the contention made at the trial that the separate corporate entities of the Appellee and the manufacturing subsidiaries had been obliterated so as to cause all of the subsidiaries and the United States Steel Corporation to be "one and inseparable", so as to make them "virtually one", the result would be that there would be no defendant in Court since the United States Steel Corporation is not a party, and the case would not be one of transportation by a railroad company, but rather of transportation by an industrial company, which we shall presently show is not within the Statute.

The contention now is that despite the actual facts the Appellee has an interest either because of the mere form of the corporate organization or on the agency theory now advanced. If it were to be assumed that the Appellee was an agent of the United States Steel Corporation in the conduct of the transportation business, it was certainly not its agent in the manufacturing business, and whilst the United States Steel Corporation might, on the agency theory, be said to have an interest in the transportation business conducted by the Appellee, as well as an interest in the products of the manufacturing companies, the Appellee, as agent of the United States Steel Corporation in

the conduct of the transportation business, certainly acquired no interest in the products produced by other separate and distinct manufacturing corporations, and had no voice in their operations.

Even if the Appellee is an agent of the United States Steel Corporation (which of course we deny), the producing companies are not in any sense agents of the Appellee. Plainly there is no way to bring the case within the Statute except resort be had to fiction or except the substance of the transaction be disregarded for mere form. The Government relies for its first proposition mainly upon the *Reading* case, which we shall later discuss, but in that case the Court disregarded form for substance.

So much for the words of the Statute.

(2) The purpose of the Statute is exactly the purpose expressed in its words.

At the request of Congress the Interstate Commerce Commission recommended a bill to amend the Interstate Commerce Act which, when introduced in Congress, became known as the Hepburn Bill. In its report the Commission said:

> *"Terminal Roads, Elevator Charges, and Private Cars.*
>
> There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like prop-

erty. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. *Such preference may take the form of an excessive division to a terminal road owned by the shipper;* the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.

It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. *We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper himself.*

We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available." (Italics ours.) (19th Annual Report of I. C. C. for 1905, p. 10.)

To accomplish the purpose recommended the Commission presented a Statute which, with slight changes, became Section 15, sub-section 13. It reads as follows:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

During the discussion of the Hepburn Bill, including the Section just quoted, another amendment was offered by Senator Elkins which finally took the form of what is known as the Commodities Clause above quoted. It thus appears that Congress had before it at the same time two closely-related situations, though radically different in practical effect, which the Congress dealt with in two different ways. One was the case of the ownership by an industrial company of a terminal railroad connecting its plant with trunk line railroads. That is the instant case. The fact that a holding company owns the stock of the railroad and of manufacturing subsidiaries does not alter the situation in substance in any degree whatsoever. The fact that the holding company had become an established institution in the industrial life of the country was well known. The fact that many of the so-called

industrial railroads were owned by holding companies which also owned the stock of their subsidiary manufacturing companies was well known. The organization of the United States Steel Corporation was, of course, well known.

The other case was where a railroad company owned an industry like a coal-mining industry, and transported the products of such industry. The Congress treated the first case by regulation. (Section 15 (13), Interstate Commerce Act.) It deal with the second situation by prohibition (Section 1 (8), Interstate Commerce Act).

If, now, subsection 8 of Section 1 be interpreted to prohibit the transportation of the commodities now being transported by the Appellee, it will prohibit what subsection 13 of Section 15 put under the supervision of the Interstate Commerce Commission to be regulated.

Another provision of the Act (Section 1 (9)) immediately following the Commodities Clause was designed to protect industries which had to acquire or construct lateral or branch lines to reach the main lines by requiring common carriers to install, maintain and operate switch connections with lateral or branch lines of railroads or sidetracks.

(3) That the purpose of the Statute was exactly that expressed in its words and no more is proved by the legislative history of the Commodities Clause.

We have quoted in Appendix (A) from the Congressional Record the debates on the Commodities Clause. When the Hepburn Bill was under consideration the practice of railroad companies owning industries, primarily coal mines, and becoming miners, shippers, sellers

and carriers of coal, was brought to the attention of Congress, and it was shown that the great railroad companies running through the anthracite coal fields were monopolizing the coal business. The case of *N. Y. N. H. & H. v. I. C. C.* (200 U. S. 361) had just been decided.

The debates quoted in the Appendix plainly show that the Congress had before it two situations for consideration: (1) The evil of discrimination practiced by the coal carriers in an effort to monopolize the coal industry, illustrated in the *N. Y. N. H. & H.* case. That it decided to prohibit. (2) The absolute necessity of industrial companies owning branch or terminal roads to connect with the main lines, which, in many instances, the latter would not themselves construct. It also had before it the statement by the Interstate Commerce Commission of the danger of excessive allowances and divisions where the industry was permitted to perform a part of the transportation service, either directly or through a subsidiary railroad. That, upon the recommendation of the Interstate Commerce Commission, the Congress decided not to prohibit, but to regulate. It thus plainly appears that in incorporating the Commodities Clause by amendments subsequent to the introduction of the Act, the Congress intended to cover only the limited field specifically covered by its terms and intended to cover another part of the field by the regulatory provisions. The words of the Commodities Clause were chosen with a nice discrimination to include just what it was desired to include and to exclude just what it was desired to exclude.

In the course of the debate Senator Tillman offered an amendment known as the "Tillman Amendment", which reads as follows:

> "After May 1, 1908, it shall be unlawful for any common carrier to engage in the transportation of interstate commerce, if such common carrier shall at the time be interested, directly or indirectly, by stock ownership or otherwise, in the article or property which is the subject-matter of such commerce, or if it be interested at the time, directly or indirectly, by stock ownership or otherwise, in the mines or factories producing such commerce; or if at the time any officer, director, agent, or employee of such common carrier be interested, directly or indirectly, by stock ownership or otherwise, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same; or if at the time stockholders owning more than 10 per cent of the capital stock of such common carrier be interested, directly or indirectly, in the business of buying or selling such article or property which is the subject-matter of such commerce, or in the mines or factories producing the same.
>
> This section shall not prevent a common carrier from mining coal or carrying articles or property for its own use or for the use of its officers, directors, agents, employees or stockholders."

It will be observed that that amendment would have prohibited transportation of products by a common carrier in which it was at the time interested "directly or indirectly, by stock ownership or otherwise", and if at the time stockholders owning more than 10% of the capital stock of such common carriers were interested in the

business of buying or selling such article or property, or in the mines or factories producing the same. That amendment was voted down. Hence, the Supreme Court was constrained to hold that the prohibited interest, direct or indirect, of the carrier was a legal or equitable interest, and that a railroad was not prohibited from transporting the products of an industry whose stock it owned for the reason that the Court could not ascribe to the Congress an intention to include what it expressly excluded. (See *U. S. v. D. & H. Co.*, 213 U. S. 366, 414; *U. S. v. D. L. & W. R. R.*, 238 U. S. 516-526.)

If it is not unlawful for a railroad to transport the products of an industrial corporation whose stock it owns, it certainly cannot be unlawful for it to transport the products of an industrial company which owns its stock, or whose stock is held by another company which also owns its stock. The agency theory which the Government now invokes might, under some circumstances, be applied to a subsidiary of the railroad company. It might be held that such subsidiary, under some circumstances, was a mere agent, and that, therefore, the railroad company itself had produced its products, or that such products had been produced under its authority or that it had an interest, direct or indirect, in such products; but the agency theory cannot possibly give it an interest, direct or indirect, in the products produced by other corporations when it is itself a distinct corporate entity. Moreover, the reason which constrained this Court to hold that a railroad company was not prohibited from transporting the products of an industry whose stock it owns, applies with much greater force when the transportation is of products produced by an industrial corporation which owns its stock, or whose stock is held by another company

which also owns the stock of the railroad company because, first, the rejected Tillman amendment applied to the latter case and, second, because in the latter case the production is further removed from the control or authority of the railroad. This Court said, in *U. S. v. D. L. & W. R. R. Co.* (238 U. S. 516, 527), after referring to its earlier holding to the effect that the rejection of the Tillman amendment unmistakably disclosed a Congressional intent not to make it unlawful for a railroad company to transport coal belonging to a corporation in which the road held stock that *"for a stronger reason it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."* That statement was not mere *dictum*. In that case the stock of the railroad and the stock of the corporation which was used as a selling agency were held by the same stockholders. The Court held that that case was within the Statute, not because of the manner in which the stock was held, but because in fact the coal company was not a *bona fide* separate corporation, but was used by the railroad company as an instrumentality to evade the Statute, and that that relation was established by and through a contract entered into between the railroad company and its creature; a coal-selling company.

Although a railroad company is not prohibited from transporting the products of an industrial company whose stock it owns, it may, of course, bring itself within the Statute by the use of a subsidiary company to evade the Statute. That was held in the case of *U. S. v. Lehigh Valley Railroad Co.* (220 U. S. 257, 274), because in that case the railroad company was found as a fact to have used its stock ownership not "for the purpose of a *bona*

fide separate administration of the affairs of a corporation in which it has a stock interest", but "for the purpose of destroying the entity of a producing corporation and of commingling its affairs in administration with the affairs of the railroad company so as to make the two corporations virtually one". In other words, it was found that the railroad company had abused its power "to do by indirection that which the Commodities Clause prohibits." Upon the undisputed evidence and the unchallenged findings this case would not be within that rule, even though the prohibition of the Statute applied to industrial as well as to railroad companies. But since the Statute applies only to railroad companies, the agency theory cannot possibly be applied so as to give a railroad company having a *bona fide* separate administration of its affairs an interest in the products produced by an industrial company which owns its stock, or whose stock is owned by another company which also owns its stock, and it will be observed that, even where the agency theory is applied to a railroad so as to give it a prohibited interest in the products of a subsidiary industrial company, it has been so applied only in the case where the corporate entity of the subsidiary producing company was so obliterated as to make it and the railroad company "one and inseparable".

Despite the fact that mere stock ownership is not an interest, direct or indirect, within the meaning of the Commodities Clause, as this Court has held, yet a railroad company may so misuse its power as a stockholder as to destroy the entity of its subsidiary and thereby give it the prohibited interest in the commodities produced, etc., but when a producing company itself owns the railroad tracks which connect its plant with trunk line railroads, or owns

the stock of a railroad company whose tracks connect its plant with trunk line railroads, or where its stock is held by another company which also owns the stock of the railroad company, then the producing company and not the railroad company is the sole owner, the sole party interested in the products transported, and on no possible theory of agency can the subsidiary railroad be claimed either to be an owner of or to have an interest in such products—indubitably so where the railroad company is a *bona fide* corporation with a *bona fide* separate administration of its affairs.

(4) The foregoing conclusions are strongly re-enforced, if indeed that be necessary, by the construction of the Statute by those charged with its execution and application.

In all the years which followed the passage of the Hepburn Bill, including the Commodities Clause and the regulatory section in 1906, the Interstate Commerce Commission, the Attorney General and Congress itself have indicated, either directly and specifically, or by implication, that the Commodities Clause means no more than it says, that there is nothing improper in an industrial company owning a railroad or in a holding company owning the stock of an industrial company and a railroad where the products of the industrial company are transported over the railroad. The investments of industrial companies in such railroads have grown to enormous proportions. Exhibit 34 [R. 417-425] is a list of 234 such railroads, valued by the Interstate Commerce Commission in excess of Three Hundred Millions of Dollars. It would be revolutionary to disturb such relations now, and the Commission said in 1905 "that it would seriously interfere with property rights which have grown up under the

present system; moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously, both to the shipper and railroad, without injury to the public, if provided by the shipper himself." (19th Annual Report of Interstate Commerce Commission 10, Defendant's Exhibit 27-a.) [R. 124.] Yet the Commission waited for 25 years, indeed until the country was plunged into a depression, to bring this suit. Who is there to take over and operate these industrial railroads?

A. Interstate Commerce Commission.

In 1910, four years after the passage of the Commodities Clause, in its 24th Annual Report, at page 33, the Commission thus defined what it called an industrial road:

> "An industrial railway may be defined as an incorporated or unincorporated railway controlled by some manufacturing or mining industry, the major portion of whose traffic is furnished by the controlling company. Such a road is distinguished from a commercial road in that it is not primarily for the sale of transportation. It is distinguished from a purely private track or siding in that the operation of its property gives rise to a service to which some definite payment or allowance may be assigned." [Defendant's Exhibit 29-a; R. 124.]

It stated in that report that there were between 2400 and 2500 of such railroads, of which it said that between 400 and 500 were enjoying divisions of rates.

In 1915 the Commission made further investigation and report, pursuant to a resolution of the Senate. 36 I. C. C. 557 [Defendant's Exhibit 31; R. 124]. The Commission found and reported:

> "* * * the relations of the steel corporation to various of its subsidiary railroad and steamship companies have been made a matter of public record. An even more complete record of all such facts has been made in the proceeding by the government, heretofore mentioned, in which it was sought to dissolve the United States Steel Corporation under the so-called antitrust law. United States v. United States Steel Corporation, 223 Fed. 55. The Commissioner of Corporations has also made an extended investigation, the results of which are incorporated in three printed volumes entitled 'Report of the Commissioner of Corporations on the Steel Industry.'
>
> The Commission comes into constant contact with the records and accounts of railroads and other public carriers through its examiners of accounts, and has reason to believe that there is no basis for the allegation that wholesale rebates have been paid to the steel corporation during the period of six years mentioned in the resolution; apparently in alleging that 'offsets' and rebates have been received by the steel corporation during that period the witnesses mentioned had in mind the dividends on the stock of the numerous subsidiary railroad and steamship lines owned by it, and as to this all the facts have been ascertained and are accessible in the various public records just mentioned. Under these circumstances we venture to believe that the resolution of the Senate is sufficiently complied with for all practical purposes by the reference to those investigations in connection with the foregoing statement." [p. 559.]

The Interstate Commerce Commission has held directly in at least two cases that "control of the carrier through stock ownership by an industrial corporation which is its principal shipper is not prohibited by the Interstate Commerce Act."

Adriatic Mining Co. v. C. & N. W. Ry. Co., 89 I. C. C. 611, 619, decided April 19, 1923;

The Alaska Investigation, 44 I. C. C. 680, 709, decided May 17, 1917.

The Commission has inferentially so decided in scores of orders which it has made with regard to industrially owned railroads, inferentially at least approving all transportation which would have been unlawful if the Commodities Clause applied.

When an industry owns a railroad, either through stock ownership or otherwise, connecting its plant with trunk lines of transportation, the right is usually claimed for an allowance or division of the through rate for transportation between the industrial plant and other points of origin or destination. This comes under the Regulatory Section (Section 15 (13)) of the Interstate Commerce Act. The Commission has approved or determined the proper allowance of rates to be paid to the railroad company in a large number of cases of this type.

In the case of *National Malleable Castings Co. v. Pittsburgh & L. E. R. R. Co.*, 51 I. C. C. 537, 541, the Commission said that it had fixed reasonable allowances for switching to and from the tracks of the line-haul carriers performed by the industry itself, either directly or through the industrial line, and it scheduled 24 such cases. Among the cases referred to were industrial or ter-

minal common carrier railroads like *Chicago West Pullman Railroad* (37 I. C. C. 488), *Chestnut Bridge Railroad* (37 I. C. C. 558), *Moshassuck Valley Railroad* (37 I. C. C. 567), *Kanawha, Glen Jean & Eastern Railroad* (41 I. C. C. 53). The allowances made were not mere switching allowances such as might be made to a shipper for use of a plant facility, they were allowances or divisions to common carriers. The Chestnut Bridge Railroad, like the appellee, was originally operated independently of any industry. In principle, none of those cases is distinguishable from the case of the appellee. Following that decision there have been numerous other decisions of like effect, among them the following:

Jones and Laughlin Steel Co. v. P. & L. E. R. R. Co., 53 I. C. C. 556;

American Steel and Wire Co. v. Newburgh and S. S. Ry. Co., 55 I. C. C. 353;

National Tube Co. v. Lake Terminal R. Co., 55 I. C. C. 469;

Lackawanna Steel Co. v. S. B. Ry. Co., 56 I. C. C. 684;

Jones and Laughlin Steel Co. v. Director General, 60 I. C. C. 325;

Benwood and Wheeling Connecting Ry. Co. v. P. C. C. and St. L. R. Co., 62 I. C. C. 357;

Carnegie Steel Company v. Director General, 80 I. C. C. 269;

Jones and Laughlin case (91 I. C. C. 300).

B. Department of Justice.

We have quoted in Appendix B [pp. 117-119], statements of different attorneys general in reports to the Congress between December 10, 1910 and 1927. These reports show that the said attorneys general, even after the decision of this court in the *Reading* case, were of the opinion that the industrial ownership of railroads was permitted by the statute—indeed, on different occasions recommendations were made to amend the Commodities Clause so as to bring the transportation by such railroads within the Act, and at least one bill was introduced in the Congress for that purpose (63rd Congress, Third Session, H. R. 20470), but the bill was never reported.

C. The Congress.

With the knowledge of the construction put upon the Act by the departments of government charged with its enforcement, the Congress has nearly every year amended the Interstate Commerce Act, but no change whatever has been made in the Commodities Clause, except possibly in punctuation. The Act was extensively revised in 1916 when amendments were proposed both in the House and in the Senate to define the "indirect interest" prohibited by the Commodities Clause as including ownership of stock in a manufacturing, mining or producing company. (See proposals by Representative Crumpacker, Congressional Record, Vol. 45 pt. 5, 5590, 5591; Representative Wanger, Id., 5594; Representative Hull, Id. pt. 8, 8479, 8480; Representative Adamson, Id., Vol. 52, pt. 1, 838; Senator Bailey, Id., Vol. 45, pt. 7, 7207, 7208; Senator Crawford, Id., 7251, 7252.)

The Act was reenacted by Congress in 1920 without change so far as the Commodities Clause was concerned. That was an adoption by the Congress of long continued executive construction.

United States v. Falk, 204 U. S. 143;

United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 339.

(5) The decisions of this Court show that the instant case is neither within the spirit nor the letter of the Commodities Clause.

(1) The case of *United States v. Delaware and Hudson Co.*, 213 U. S. 366 (May 3, 1909):

This case will, for convenience, be referred to as the *Hudson* case.

Several cases were considered together. In some of the cases it appeared that the railroad company owned the stock of a corporation which mined coal which the railroad company transported. A large part of the opinion is given to the question of the constitutionality of the clause [392-414]. The court then interpreted the clause. It kept the language of the clause clearly in mind. It recognized that the problem before it, under the words of the statute, was whether the railroad company owned or had any interest, direct or indirect, in the coal transported merely because it owned the stock of the coal company.

The court reached the conclusion that the Commodities Clause prohibits a railroad company from transporting coal only "when the carrier at the time of the transportation has an interest, direct or indirect, *in a legal or equitable sense*, in the article or commodity, not including, therefore, articles or commodities manufac-

tured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder" [p. 415].

In other words, the court held:

(a) A railroad company does not have, within the meaning of the Commodities Clause, an interest, direct or indirect, in coal produced by a mining company when it merely owns the stock of the mining company, and

(b) The interest, direct or indirect, within the meaning of the clause, is a *legal or equitable interest.*

The Supreme Court was constrained in part to reach that conclusion by the action of Congress in rejecting an amendment to the Commodities Clause offered by Senator Tillman (213 U. S. 414). That amendment, if it had been adopted, would have made the Clause apply when the railroad owned stock in the corporation producing the commodity transported by the railroad company. The Tillman amendment also would have applied when stockholders holding even 10 per cent of the stock of a railroad were also interested, directly or indirectly, in the business of buying or selling the article transported or in the mines or factories producing the same [quoted in Appendix 112].

This case is very persuasive in the present case. If a railroad company owning stock in a producing company does not have an interest, within the meaning of the Commodities Clause, in the products of such producing company, then *a fortiori* it does not have such interest in the product of another company merely because a holding company has stock ownership in both such company and the railroad. As between stock ownership by a railroad in an industry, stock ownership

by an industry in a railroad, and stock ownership both in a railroad and in an industry by a holding company, the interest in the first case would be the most direct and in the last the least direct.

(2) The case of *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257 (April 3, 1911):

This case will, for convenience, be referred to as the *Lehigh* case.

It is one of the cases decided by the Supreme Court under the title of *United States v. Delaware and Hudson Company*, 213 U. S. 366, above referred to.

The case was reversed and remanded in *U. S. v. Delaware and Hudson Company*, 213 U. S. 366. In the lower court the Government presented an amended bill and asked leave to file it. This was refused.

The question in the *Lehigh* case was whether the lower court committed error in refusing leave to file the amended bill. The Supreme Court held that the amended bill made a different case and reversed the case and sent it back again.

The Supreme Court adopted (266) its decision in the *Hudson* case that:

(a) A railroad company does not have an interest, direct or indirect, in the coal produced by a mining company within the meaning of the Commodities Clause when it owns the stock of the mining company.

(b) An interest, direct or indirect, within the meaning of the Commodities Clause, is a legal or equitable interest.

The court then adopted this further proposition raised by the amended bill.

(c) *If a railroad company owns all the stock of a mining company and then so controls the mining company as to obliterate the distinction between the two legal entities, depriving the mining company of all really independent existence and making it a mere agent or department of the railroad, then the railroad company does have an interest within the meaning of the clause in the coal produced by the mining company.*

For the purpose of understanding the position of the Supreme Court in the *Reading* case, later to be considered, this *Lehigh* case is of the greatest importance. It sets the limits beyond which the Commodities Clause cannot be carried.

Under the principles of this case, all of the evidence produced against the Elgin, Joliet and Eastern Railway Company in the instant case becomes unimportant and even trivial. The case stands as the ultimate judgment of this court, not only unchallenged but reaffirmed in the *Reading* case.

The court held very definitely, as will appear on pages 273 and 274 of its opinion in 220 U. S., that:

1. The ownership by the railroad company of the stock of the coal company did not bring the case within the Commodities Clause.

2. That the control exercised by the railroad company over the coal company was not the result of the ownership by the railroad company of the stock in the coal company but of something in addition to that ownership.

3. The control which the railroad company exercised over the industrial company was such as "could

not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company" [273].

4. "The right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of the corporation in which it has a stock interest may not be denied" [274].

5. But "the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the Commodities Clause. In other words, that by operation and effect of the Commodities Clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the Commodities Clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable."

In other words, in order to bring a railroad company within the Commodities Clause, the control exercised by the railroad company over a producing company must extend so far as "to make the two corporations virtually one," that is to say, "so as to cause them to be one and inseparable."

(3) The case of *United States v. Delaware, Lackawanna and Western Railroad Company*, 238 U. S. 516 (June 21, 1915):

For convenience, this case will be referred to as the *Lackawanna* case.

In the instant case the United States Steel Corporation is a holding company, holding the stock of the Elgin, Joliet and Eastern Railway Company and also holding the stock of several producing companies whose products are transported by the Elgin, Joliet and Eastern Railway Company; the fact that the United States Steel Corporation is a holding company, holding stock of a railroad company and of a producing company is much emphasized.

The *Lackawanna* case is of the very greatest importance because it specifically and definitely decides that the union, in one unit, of stock of a railroad company and of stock of a producing company, whose products the railroad company transports, does not bring the case within the Commodities Clause. The court said:

> "But mere stock ownership by a Railroad, or by its stockholders, in a producing Company cannot be used as a test by which to determine the legality of the transportation of such Company's coal by the interstate carrier. For, when the Commodity Clause was under discussion, attention was called to the fact that there were a number of the anthracite roads which at the time owned stock in coal companies. An amendment was then offered which, if adopted, would have made it unlawful for any such Road to transport coal belonging to such Company. The amendment, however, was voted down; and, in the light of that indication of Congressional intent,

the Commodity Clause was construed to mean that it was not necessarily unlawful for a railroad company to transport coal belonging to a Corporation in which the Road held stock. *United States v. Delaware & Hudson Co.*, 213 U. S. 414. *For a stronger reason, it would not necessarily be illegal for the Road to transport coal belonging to a Corporation whose stock was held by those who owned the stock of the Railroad Company.*" [526]. (Italics ours)

There is no ambiguity in that language and it exactly rules the instant case. It was germane to the question actually decided because the converse of the proposition stated would have made it unnecessary to rule on the *bona fides* of the transaction there involved.

This case held that the railroad company came within the purview of the Commodities Clause but not because of the way in which the stock of the producing company was held, but because the transaction under examination was not *bona fide*. The court followed its decision in the *Lehigh Valley* case (220 U. S. 257, 273) above referred to, to the effect that one corporation can be made an agent of another corporation and that, by means of stock ownership, one such company may convert a subsidiary into a mere agent or instrumentality (529). It then held that such a relation was established by and through a contract entered into between the railroad company and its creature, a coal-selling company.

The *Reading* case (253 U. S. 26), will be considered under the next point:

II.

Answering the Government's Point I, the Mere Holding by One Company of the Stock of Another Does Not Ipso Facto Make the Latter a Mere Agent or Instrumentality of the Former or Give It an Interest in the Products Produced by Other Corporations Whose Stock Is Also Held by the Former.

The Government's real contention appears to be that a holding company necessarily involves the surrender by the subsidiary of all but a "semblance of independent existence." The complete answer to that proposition is that as conclusively established by unchallenged findings that has not happened in the instant case. Whether it happens in any case will depend entirely on the use made by the holding company of its stock ownership. The Government seems to think that there is a distinction in that regard between an operating and a non-operating holding company. Manifestly, either can make the same use of its stock ownership; either can allow a *bona fide* separate administration of the affairs of the subsidiary; either can make use of a subsidiary to commit a wrong. The Statute is not violated merely because there may be potential power to violate it. That certainly was decided in the first of the commodities cases (*U. S. v. D & H. Co.*, 213 U. S. 366), and in fact was so ruled in all of the commodities cases. The Commodities Clause was not aimed at holding companies. It says nothing about holding companies. It does not forbid holding companies, nor does it forbid railroads from transporting commodities produced by a subsidiary of a holding company. It specifically defined what it prohibits. Congress did not promulgate a broad general rule to cover all situations—on

the contrary, it expressly limited its action to two specific things: It prohibited railroad companies from transporting commodities which it itself produced and had an interest in, and at the same time provided that if a shipper of goods was participating in the transportation of its goods, such action should not be prohibited, but should be subject to the supervision of the Interstate Commerce Commission.

The instant case is plainly not within the terms of the prohibition. If it were it would not matter that there is an entire absence of wrong-doing or of any wrongful intent. True, a device outside of the literal words of the Act might be employed to evade it. In that case the court would look through form to substance. In that case the court would inquire into the *bona fides* of the transaction. In that case the question would not be one of potential power, it would be whether a device had been employed to evade the law to accomplish the very evil prohibited by the law. The instant case is utterly devoid of any such element. As stated by the District Court, the acquisition of the stock of the Appellee "grew out of an important business need. It served a legitimate economic purpose." [R. 510.] The lawfulness of its ownership by the United States Steel Corporation has been adjudged by this Court. Its *bona fide* separate administration of its own affairs, *i. e.*, its transportation business, was established by the evidence. Moreover, it was affirmatively established that the evil of discrimination aimed at by the Commodities Clause had not been present. [R. 105-116.] The Government says that that evidence merely proves that "the particular shippers and traffic officers who testified had no complaint to offer." The author of that statement was not present at the trial

and not aware of the disclaimer made by the trial counsel for the Government. He must also have overlooked the stipulation that the long list of shippers and officers of connecting carriers would, if called, testify to like effect. [R. 116-118.]

We do not say that that evidence would be an answer if the case were within the terms of the Statute, but we do say that it is a complete answer to the claim that though not within the words of the Statute, it is within the spirit because of the use made by the United States Steel Corporation of its stock ownership.

Of course, the Court will always look through form to substance where a device, no matter what, that of a holding company or any other device, is employed, to evade the law. Such was the *Northern Securities* case cited by the Government. Such, in truth, was the *Reading* case relied upon by the Government, presently to be discussed. Both cases were Anti-Trust cases.

If the contention now made by the Government were sound, all of the Commodities Clause cases have been decided by this Court on the wrong theory, and the very first case was wrongly decided. Any company which holds the stock of another company is *pro tanto* a holding company. It may have other business, but there can be no such distinction as the Government attempts to make between operating companies and non-operating companies which hold the stock of other companies. The Government seeks to read into the Statute something which the Congress expressly excluded, not inadvertently, but after careful consideration.

It is not true, as stated by the Government, that the purpose of the Commodities Clause was broadly to di-

vorce transportation from production. That certainly was decided in the *Delaware & Hudson* case. The purpose of Congress was much more limited, but it was definite. It was to prevent the evils of discrimination and monopolization practiced by railroads engaged in competition with their shippers, primarily the trunk line coal carriers. True, by its terms it applies generally to any railroad, but its application is thus limited to any railroad and cannot be extended to an industry. The ownership of transportation facilities by industries, whether in corporate form or not, and the performance of transportation services by the use of such facilities, was as we have shown, not prohibited, but was expressly regulated and thereby was authorized.

To summarize:

(1) The assertion of the Government that the mere holding of stock by a holding company involves the surrender to the holding company of the entire conduct of the affairs of the subsidiaries, and their abdication of all independent corporate action as a matter of law, is proven to be false as a matter of fact in the instant case:

> "The primary business of defendant is that of a common carrier. Its other acts and transactions were incidental to its primary business of transportation. The United States Steel Corporation never took any part in transporting any commodities over the railroad of the defendant or in operating or in managing the operation of defendant's railroad or of any of the facilities of such operations or gave any directions or exercised any control over the transportation conducted over the railroad of defendant or took any part in any of the transactions between the defendant and the shippers over its railroad." [Finding 2, R. 497.]

(2) This case is founded on a Statute and nothing else.

(3) The Congress, after careful consideration, expressly excluded what the Government now asserts it included,—the precise situation involved in the *Delaware & Hudson* case. The Tillman amendment would have expressly covered the holding company situation. It was rejected.

(4) The Commodities Clause was not intended to provide a broad general rule covering the relations between transportation and industry, but was limited not only by what it expressly said, but as well by what it expressly excluded, and by express provisions of regulation in lieu of prohibition.

(5) Though the holding company may be used as a device to violate or evade the law, the fact of such violation or evasion must be established,—certainly when the case is not within the terms of the Act.

The Government's real reliance is on *U. S. v. Reading Co.* (263 U. S. 26) which we now discuss, first pointing out that the prior decisions of this Court already considered were expressly approved and reaffirmed, and indeed were made the basis of the decision in the *Reading* case. It is also to be observed that disregarding form for substance and reality, the fundamental distinction between the *Reading* case and the instant case is that the *Reading* case involved the very evils sought to be prohibited by the Commodities Clause, a railroad in fact attempting to monopolize the coal business in a particular field through the device of a holding company owning the stock of the railroad and the coal company, a device employed, as the Court found, to evade the Anti-Trust laws

and to accomplish the purpose prohibited by the Commodities Clause, wherefore the illegal combination was dissolved. The instant case involves no such element. The combination is not illegal. The Appellee was acquired to serve a legitimate economic purpose. The corporate set-up was not a device to evade or violate any law. The ownership of the stock of the Appellee has not been used to accomplish the purpose prohibited by the Commodities Clause. The United States Steel Corporation is not even a party to the suit which is one to enjoin the railroad not to dissolve an illegal combination.

The Reading Case.

United States v. Reading Company, 253 U. S. 26, decided April 26, 1920.

(1) Facts in the Reading case as compared with the facts in the instant case.

The points of similarity between the *Reading* case and the present case against the Elgin, Joliet and Eastern Railway Company are these:

The Reading Company was a holding company. It owned the stock of a railroad company. It also owned the stock of a coal company. The railroad company transported coal produced by the coal company.

The United States Steel Corporation is a holding company. It owns the stock of the Elgin, Joliet and Eastern Railway Company. It owns the stock of several companies producing articles of steel of various kinds. The Elgin, Joliet and Eastern Railway Company transports commodities produced by these subsidiaries of the Steel Corporation.

At this point, however, the similarity between the two cases ends. Further examination of the case will reveal these differences:

(a) In the *Reading* case the holding company acquired in the reorganization all the equipment, engines, cars and ships and the tidewater terminals formerly owned by the railroad company, thus enabling it to control the common carrier service and disabling the railroad from performing such service without its aid. In respect of that the Court said (p. 46):

> "* * * by the plan of reorganization adopted it was disabled from performing its functions as a carrier, except with the aid of the Holding Company, for all of the equipment, engines, cars and ships, owned by the former Railroad Company, and its tidewater terminals at Philadelphia and on New York Harbor, were allotted to the Holding Company."

In the instant case, there is nothing of that sort. On the contrary, the Defendant railroad not only owns and has greatly improved all the property that it ever owned, but to enable it more efficiently to perform its common carrier service has acquired through lease the property of the Chicago, Lake Shore and Eastern Railway Company, a subsidiary of the Illinois Steel Company.

(b) In the *Reading* case the properties of the holding company, the coal company and all of the railway were combined under a mortgage for $135,000,000.

In the instant case, the properties of the Defendant railroad have been kept entirely separate and distinct from the properties of the holding company and its other subsidiaries.

(c) In the *Reading* case the railroad company paid no dividends, but the earnings of the railroad company and the coal company were commingled with the earnings of the holding company which, as the court said, "served to pool the property, the activities and the profits of the three companies." (253 U. S. 48).

In the instant case, there has been no commingling of earnings whatsoever and the holding company has received nothing from the railway company except by way of dividends, which is the normal method by which a stockholder receives a distribution of earnings.

(d) In the *Reading* case the holding company, not the railroad, entered into a combination with five other anthracite-carrying rai[illegible] to prevent the construction of an independent and competing railroad known as the New York, Wyoming & Western Railroad.

In the instant case, there is nothing of that sort.

(e) In the *Reading* case, the coal company, the holding company and the railroad company had the same officers, directors and managers and were operated as one concern. With respect to that the Court said (253 U. S. 61-62):

> "All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire

conduct of their affairs. *It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines.*" (Italics ours.)

In the instant case the railroad is managed and operated by and under the authority of its own officers and managers, none of whom are in any way connected with the holding company or any of its subsidiaries.

(2) Issues in the Reading case as compared with the issues in the instant case.

The *Reading* case was brought by the United States against the Reading Company (a holding company holding the stock of a railroad company and the stock of a coal company) and against the railroad company and the coal company (253 U. S. 41). The remedy prayed for was that the combination of the holding company, the railroad company and the coal company be dissolved with a provision for disposing of the shares of the stock held by the holding company in the other companies (253 U. S. 64). The suit was based upon the claim that the Sherman Anti-Trust Act and also the Commodities Clause were being violated (253 U. S. 41).

In contrast it will be noted that in the instant case, although the United States Steel Corporation owns the stock of the Elgin, Joliet and Eastern Railway Company, and the stock of subsidiary producing companies, only the Elgin, Joliet and Eastern Railway Company is made a party. The prayer is that the Elgin, Joliet and Eastern Railway Company be restrained from transporting commodities produced, etc., by itself or by the subsidiaries of the Steel Corporation.

(3) The finding and the decree in the Reading case.

Let us recur to the statement of the Supreme Court (*United States v. Delaware & Hudson Co.*, 213 U. S. 366, 409) that the Commodities Clause contained four generic prohibitions forbidding a railroad from transporting commodities—(1) which it had manufactured or produced, (2) which have been so mined, manufactured or produced under its *authority*, (3) which it owns in whole or in part, and (4) in which it has an interest, direct or indirect (this Brief, p. 2). The *Reading* case concerned itself with the second proposition and disregarded the others.

The court held that the coal in that case

> "was mined and produced under the same '*authority*' that transported it over the railroad. All three of the Reading companies had the same officers and directors and it was under their *authority* that the mines were worked and the railroad operated, and they exercised that *authority* in the one case in precisely the same character as in the other—as officials of the Holding Company. * * * It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same '*authority*' that operated the Reading Railway lines." (Italics ours.)

Having held that the coal was mined under the "*authority*" of the holding company and that it was transported under the "*authority*" of the holding company, the court decreed that the combination of the holding company, the railroad company and the coal company be dissolved, with provision for disposing of the shares of the stock held by the holding company in the other companies (253 U. S. 64).

(4) The Reading case did not hold that the ownership by a holding company of the stock of the railroad company and the stock of the coal company brought the case within the Commodities Clause.

The language of the opinion which must be construed in this connection is as follows (253 U. S. 60):

> "The Circuit Judges centering their attention: upon the fact that the Reading Railway Company did not own any of the stock of the Reading Coal Company; that the two companies had separate forces of operatives and separate accounting systems; and upon the importance of maintaining 'the theory of separate corporate entity' as a legal doctrine, concluded, upon the authority of *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 413, that the evidence did not justify holding that in transporting the products of the Reading Coal Company's mines to market the Reading Railway Company was carrying a commodity 'mined, or produced by it, or under its authority' or which it owned 'in whole, or in part,' or in which it had "any interest direct or indirect.'
>
> "But the question which we have presented by this branch of the case is not the technical one of whether ownership by a railroad company of stock in a coal company renders it unlawful for the former to carry the product of the latter, for here the railroad company did not own any of the stock of the coal company. The real question is whether combining in a single corporation the ownership of all the stock of a carrier and all of the stock of a coal company results* in such community of interest or title in the product of the latter as to bring the case within the scope of the provisions of the act."

There are many reasons which demonstrate conclusively that the Court, by this language, did not mean that the

mere holding by the holding company of the stock of the railroad company and the stock of the coal company alone, without accompanying facts such as were considered by the Court in the *Lehigh* case (220 U. S. 257), brought the case within the Commodities Clause.

We submit that that question should be read as though the phrase "under the facts of this case" were inserted after the word "results"* since, after stating the question the Court proceeded to answer it by showing that in fact the manner in which the stock was held had resulted "in the abdication of all independent corporate action by both the railroad company and the coal company" and "the surrender to the holding company of the entire conduct of their affairs", and to the coal being mined "by the same authority that operated the railway lines." The evidence is undisputed in this case that no one connected with the United States Steel Corporation does anything or takes any part whatever in the operation of the E. J. & E. R. R., and the District Court so found. [Finding 2, R. 497.]

By posing a question the Court could not have intended to overrule what it had previously decided, especially in the *Lackawanna* case, which directly involved the question whether the particular manner of stock-holding here involved *ipso facto* brought the case within the Statute.

(a) The *Hudson* case.

In the case of *United States v. Delaware & Hudson Co.*, 213 U. S. 366, the Supreme Court specifically held that where a railroad company owns the stock of a coal company and transports the coal produced by the coal company, it does not come within the Commodities Clause; that in order for a railroad company to come within the Commodities Clause it must have an interest which is of

a legal or equitable character in the coal transported, and that the mere ownership of the stock of a coal company does not give it such an interest.

(b) The *Lehigh* case.

In the case of *United States v. Lehigh Valley Railroad Company*, 220 U. S. 257, the Supreme Court adopted the decision of the *Hudson* case but held that if a railroad company owns all of the stock of a coal company and then so manages and operates the business of the coal company as to wipe out all distinction between the two corporate entities and "make the affairs of the railroad company and of the coal company practically indistinguishable and therefore to cause both corporations to be one for all purposes," then the railroad company does come within the Commodities Clause (220 U. S. 272). As has been said before, this case furnishes the test when the railroad company does not literally produce, etc., the coal which it transports, and when, notwithstanding such fact, it is claimed that it comes within the Commodities Clause.

(c) The *Lackawanna* case.

In the case of the *United States v. Delaware, Lackawanna & Western Railroad Company*, 238 U. S. 516, *the Supreme Court passed upon the exact question now under consideration. It held that when the stock of a railroad company and the stock of a coal company were united in one holding, this does not bring the case within the Commodities Clause.* The court held in that case that the railroad company did come within the Commodities Clause but because, and only because, of a contract between the railroad company and the coal company by which, under the theory announced in the *Lehigh* case, the distinction

between the corporate entities of the two companies was destroyed and the two were made one and inseparable.

(d) The Supreme Court in the *Reading* case, in considering one of the groups of companies involved, cited the *Hudson* case, the *Lehigh* case and the *Lackawanna* case, all as the foundation upon which it based its decision. It then said (p. 62):

> "It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in the manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may rquire. *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 272, 273; *United States v. Delaware, Lackawanna & Western R. R. Co.*, 238 U. S. 516, 529; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Association*, 247 U. S. 490, 501."

Here is a clear and forceful recognition of the distinction on the one side between a railroad company holding the stock in a producing company (213 U. S. 366) and also the union of the stock of a railroad company and the

stock of a producing company in one holding (238 U. S. 516), and on the other side the domination by a parent corporation over the business of the subsidiary to such an extent as to wipe out the distinction between the corporate entities and make them one and inseparable (238 U. S. 516).

(e) To hold on the one side that a railroad company owning the stock of an industrial company does not come within the Commodities Clause, and then to hold on the other side that a holding company owning the stock of a railroad company and the stock of a producing company does come within the Commodities Clause, is to make the question turn upon a mere form. There is no reason in it. The *Reading* decision is very emphatic that it is the duty of the court in such cases to look through the form to the substance.

(f) As has been shown above, when the Commodities Clause was pending in Congress an amendment was offered which would have made the clause apply to the case of a railroad company whose stock is held by a holding company, which holding company also holds the stock of a producing company, but it was rejected. And we have the authority of this Court in the case of *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 414, and in the case of *United States v. Delaware, Lackawanna & Western Railroad Company*, 238 U. S. 516, 526, that such action by Congress is conclusive in the construction of this Statute.

(g) Proceeding in the discussion, the Court in the *Reading* case said (p. 60):

> "The purpose of the commodity clause was to put an end to the injustice to the shipping public, which

> experience had shown to result from discriminations of various kinds, which inevitably grew up where a railroad company occupied the inconsistent positions of carrier and shipper."

But clearly Congress had the right to determine the method which it should adopt to prevent such discriminations. It must be kept in mind that Congress adopted two remedies. By the Commodities Clause it prohibited a railroad company from transporting commodities produced, etc., by such railroad company; by the Regulatory Section it conveyed to the Interstate Commerce Commission the duty of regulating and fixing charges when a producing company shipped its commodities over a railroad in which it had an interest.

(5) In the Reading case, it was the control exercised by the holding company over the railroad company and over the coal company, destroying the distinction between the corporate entities and making them all one and inseparable, which the court held brought the case within the Commodities Clause.

The domination and control of the holding company over the railroad company and the coal company was very complete. It was not confined to the internal affairs of the corporations but extended to the conduct of the railroad transportation business and of the coal business. The holding company "continued in *active dominating control* of the Reading Railway Company and of the competing Central Railroad system, and also of the two coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings" (59). The domination of the holding company created "unlawful discriminations against outside shippers of coal over the rails of these two (railroad) companies" and "unusual

credits had been allowed the latter (the Coal Company) in the payment of its freight bills" (a violation of the Interstate Commerce Act) (54). "All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated" (61). The plan of a holding company holding the stock of the railroad company and the stock of the coal company was adopted "for the purpose of evading the provisions of the Constitution of Pennsylvania and the provisions of the Federal Anti-Trust Act" (56, 57).

The language of the opinion which must be construed in this connection is as follows (61):

> "In terms the act declares that it shall be unlawful for any railroad company to transport in interstate commerce 'any article or commodity . . . mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect.'
>
> "Accepting the risk of obscuring the obvious by discussing it, and without splitting hairs as to where the naked legal title to the coal would be when in transit, we may be sure that it was mined and produced under the same 'authority' that transported it over the railroad. All three of the Reading companies had the same officers and directors and it was under their authority that the mines were worked and the railroad operated, and they exercised that authority in the one case in precisely the same character as in the other—as officials of the Holding Company. The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by both the Railway Company and the Coal Com-

pany, involving as it did the surrender to the Holding Company of the entire conduct of their affairs. It would be to subordinate reality to legal form to hold that the coal mined by the Coal Company, under direction of the Holding Company's officials, was not produced by the same 'authority' that operated the Reading Railway lines. The case falls clearly within the scope of the act, and for the violation of this commodity clause, as well as for its violation of the Anti-Trust Act, the combination between the Reading Railway Company and the Reading Coal Company must be dissolved."

The facts found by the Court and involved in this argumentative statement are as follows:

1. All three of the Reading companies, that is, the holding company, the railroad company and the coal company, had the same officers and directors.

2. The mines of the coal company were worked and the railroad of the railroad company was operated under the authority of the said officers and directors.

3. These officers and directors exercised their authority as officers of the holding company.

4. Both the railroad company and the coal company *abdicated all independent corporate action.*

5. Both the railroad company and the coal company *surrendered to the holding company the entire conduct of their affairs.*

When the Court said that "The manner in which the stock of the three was held resulted, and was intended to result, in the abdication of all independent corporate action by the Railway Company and the Coal Company, involving as it did the surrender to the Holding Company of the entire conduct of their affairs" the Court did not mean and could not have meant that the holding by the holding company of the stock of the two other companies alone, and with no other aid, produced in mathematical sequence the "abdication" by both the other companies "of all independent corporate action" and the "surrender" by such other companies "of the entire conduct of their affairs." *It is perfectly apparent that if the holding company had done nothing but acquire the stock of the other two companies, the effect mentioned could not have resulted.* To produce the effect referred to required necessarily the further action by the officers and directors of the holding company in taking over the working of the mines and the operating of the railroad. The holding of the stock of the railroad company and of the mining company by the holding company resulted in the abdication and surrender by the latter companies of the conduct of their affairs only in the sense that such ownership of the stock *rendered possible,* through the election of directors and officers, complete control of the subsidiaries and that such power was then so exercised as to result in the abdication and surrender by the subsidiaries of the conduct of their affairs.

In this connection it must be kept in mind constantly that the officers of the holding company were the managing officers of the coal company and were the managing officers of the railroad company and *that the mines were worked and the railroad operated under their authority.*

Very clearly the Court meant by the language quoted just what it meant in the *Lehigh* case (220 U. S. 257, 273, 274) when, in answer to the argument that a railroad could not come within the statute when it held stock in a producing company whose product it transported, it said:

> "The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. . . . In view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purposes of a *bona fide*

> separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable."

That the Court used the words quoted in the sense above stated is further made manifest by what the Court said only two pages later.

The Court on page 62 "confidently" stated what "the law upon this subject now is." In there stating what "the law upon this subject now is" the Court said that "ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful under the commodities clause for the

railroad company to transport in interstate commerce the products of such mining company." And the Court further stated that the result only followed when such ownership of stock was resorted to "not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but *for the purpose of making it a mere agent, or instrumentality or department of another company.*"

Further, it will be remembered that the Court, in stating that understanding of the law, based its opinion on its own decisions in the *Hudson* case, 213 U. S. 366; the *Lehigh* case, 220 U. S. 257, 273, and the *Lackawanna* case, 238 U. S. 516, 529.

This Court, having established and steadily adhered to the proposition that for the purposes of the Commodities Clause the ownership by a railroad company of the stock of a producing company whose products it transports does not destroy the distinction between the two legal entities, it could not have intended to say that the holding by a holding company of the stock of a railroad company and the stock of a coal company alone and without any other facts, destroyed the distinction between the three legal entities. If the holding by one company of all of the stock in another company does not destroy the distinction between the two legal entities, then the holding by one company of all of the stock of each of two other companies *cannot* destroy the distinction between the three legal entities or any of them. And so this Court had held in the *Lackawanna* case (238 U. S. 527), cited, approved

and adopted in the *Reading* case, when the Court, after citing the doctrine that when a railroad company owns the stock of a coal company it does not come within the statutes stated, "for a stronger reason, it would not necessarily be illegal for the road to transport coal belonging to a corporation whose stock was held by those who owned the stock of the railroad company."

(6) The Reading case is not applicable to the instant case.

Reduced to its simplest terms, the *Reading* case was this: A railroad company, and a coal company, and a holding company owning the stock of the other two, were sued. The Court ordered the dissolution of the combination and the disposition by the holding company of the stock it held in its subsidiaries, because the companies were violating the anti-trust laws and because the holding company was so exercising its power over its subsidiaries that they abdicated all independent corporate action and surrendered to the holding company the entire conduct of their affairs, thereby bringing the holding company within one part of the Commodities Clause.

It is apparent that the *Reading* case can have no application to the instant case—a case in which a railroad company is the only defendant and in which it is not claimed that that defendant did *in fact* any of the things made unlawful by the Commodities Clause or that it dominated or controlled to even the slightest extent any producing company.

III.

Answering the Government's Point II, the Facts Discussed Under This Point Are Irrelevant to Any Issue in the Case and the Ultimate Facts Have Been Found Contrary to the Government's Contentions.

We start the discussion under this head with the fact found and not now disputed that the separate corporate entity of the Appellee has not been destroyed, obstructed or interfered with in any way by the United States Steel Corporation [Findings 2, 3, R. 497].

None of the matters discussed under this point by the Government has anything to do with the operation of its railroad by the Appellee. The District Court found that that was attended to exclusively by the Appellee through its own officers and employees, and that the United States Steel Corporation took no part in it whatsoever. [Findings 2, 8, 9, 10, R. 497, 498.] That is in accordance with the undisputed evidence. [R. 120, 62, 63, 36.] Government counsel evidently appreciate that they have gone far afield under this point since they select four of the many matters discussed and say on page 45 of the brief, "Clearly these matters have directly to do with the Appellants common carrier functions."

The four matters referred to are:

(1) Appropriations for capital expenditures are submitted to the United States Steel Corporation for approval after they have been decided upon by the officials of the Appellee. [R. 37.] The Government brief erroneously says, "The Steel Corporation decides, except in the case of negligible expenditures, whether Appellee shall make improvements to its road."

(2) The Appellee deposits, from time to time, portions of its surplus earnings with the United States Steel Corporation, subject to call, the same as it makes deposits in a bank [R. 34], on which it receives interest. [R. 54.] The Government brief erroneously says of this, "It draws into its control Appellee's surplus funds."

(3) Judge Gary, Chairman of the Board, United States Steel Corporation, was consulted by Mr. Banks the President of the Appellee, on the subject of a proposed lease of the C. L. S. & E. R. R. Co. whose stock was owned by the Illinois Steel Company, by the Appellee. The actual bargain was negotiated between Mr. Banks, the President of the Appellee, and Mr. Buffington, the President of the Illinois Steel Co. [R. 61.] Judge Gary did not even discuss the matter until Mr. Banks and Mr. Buffington had made their bargain, and Mr. Knapp had approved it from the legal standpoint. [R. 135.] The Government says of this that the Steel Corporation decided whether the Appellee should make the lease.

(4) As stated in the Government brief, the Steel Corporation "participated in the negotiations respecting the agreement for trackage rights over the lines of the Chicago & Eastern Illinois Railroad Co." That participation, however, consisted solely of advice. [R. 32, 41.]

The Government, through the powers of the Interstate Commerce Commission, has been able to go through the Appellee's files and records and to examine into all of its business transactions covering the period of thirty years of ownership of its stock by the Steel Corporation prior to the commencement of the Government suit. The Ex-

hibits in evidence, including the correspondence over that period, are presumably all that could be found that was thought to aid the Government's case in any way. It is the strongest kind of negative evidence for the Appellee. It shows that the most scrupulous care was exercised to observe and respect the separate and independent administration of its affairs by the Appellee. It shows that in all the dealings between the Appellee and the United States Steel Corporation or its producing subsidiaries, the most scrupulous regard was paid to the rights of each of the parties, and that they dealt at arm's length, the officials of each company seeing to it that its rights and interests were protected. The above four matters constitute all that the Government even claims have anything to do with common carrier functions. Mr. Filbert, the Chairman of the Finance Committee of the United States Steel Corporation at the time of the trial, formerly its Comptroller, who had the most intimate knowledge of the transactions involved over the entire period of anyone connected with the corporation [R. 58] said that the two contracts above referred to, the C. L. S. & E. lease and the C. & E. I. trackage agreement, were the only two contracts made by the Appellee during the entire period that were even discussed with the officials of the Steel Corporation before they were made. [R. 62.] Surely the Appellee could consult its stockholders on such important matters as capital expenditures, the leasing of another railroad, of the acquisition of trackage rights over another railroad, without abdicating its own control over its own corporate action and without surrendering the entire conduct of its affairs. Likewise, it could deposit its surplus earnings, or a part of them, at interest, subject to withdrawals, without commingling its own affairs with

the affairs of the Steel Corporation. Moreover, neither of the said four matters had anything whatsoever to do with the manner in which the Appellee should operate its railroad or perform its transportation services.

The terms "agent," "instrumentality," "department" and "branch" are used throughout the Government brief, but just what the Government means by those terms is not plain. It certainly does not mean that the corporate entity of the Appellee has been obliterated so that the two corporations are one and indistinguishable, for that is no longer the claim.

It does not mean that the true relation of principal and agent exists or ever has existed between the Appellee and the United States Steel Corporation. There is not one single instance to be found in all of the evidence of the Appellee acting as agent of the United States Steel Corporation.

One corporation owning all the stock of another might so misuse its stock ownership as to destroy the separate administration of its affairs by the latter, and thus obliterate it as separate entity. In that case it would make itself responsible for what was done in the latter's name. That is no longer claimed in this case.

So, also, a corporation owning all of the stock of another might, without destroying the latter's corporate entity, so employ it as an agent as to make itself responsible for its acts. That has never been claimed in this case.

What, then, do the terms employed by the Government mean? Until they are given some definite meaning we must assume that they are employed to conceal confusion

of thought for want of any recognizable legal basis for the claim made.

The United States Steel Corporation certainly is not engaged in the transportation business—indeed, the Government maintains that it is not engaged in any business and that there is something sinister in the fact that it is merely a holding corporation. Of course, the Government does claim that because it is only a holding corporation it is engaged in all of the businesses of its subsidiaries, an obvious *non sequitur*. The Appellee does not perform its common carrier service as agent for anybody. The relations between it and its shippers, whether the producing subsidiaries of the United States Steel Corporation or other shippers, is that of carrier and shipper. It renders that service for all alike for its published tariff rates. It accounts to no one for what it receives. The United States Steel Corporation receives nothing from it ecept by way of dividends. [R. 56, 95.]

Though we maintain that the matters under consideration are all irrelevant, since they constitute the Government's case, we will now briefly discuss them in the order in which they are presented in the Government's brief:

(1) Interlocking directors.

There is no claim that there has ever been a common director since 1920, and the undisputed evidence is that there are no common directors, officers or employees. [R. 41.]

(2) Method of selecting appellee's officers and directors.

The "minor exceptions" of directors selected from officials or employees were the President of one bank and two Vice Presidents of another bank. [R. 47.] Certainly it is the function of the stockholders to select the directors, and the fact that the United States Steel Corporation left the administration of the affairs of the Appellee so completely to its management as even to give its proxy to the President of the Appellee [R. 30] would seem to be the exact opposite of domination and control.

(3) Declaration of dividends.

Dividends to be declared is again an appropriate matter to discuss with the stockholder. The record makes it plain that Mr. Banks both initially and ultimately decided on the dividend to recommend to the directors. He did consult Judge Gary and Mr. Filbert. In his own language Judge Gary would say, "If you think you can afford it, why, no objection to it that I know of." [R. 35.] When Mr. Banks and Mr. Filbert disagreed on one occasion as to the amount of a dividend to be declared, Mr. Banks held out and declared the dividend that he proposed just the same, which was larger than Mr. Filbert thought advisable. [R. 56.] From that incident, and many others appearing both in the testimony of Mr. Banks and the other witnesses, and the correspondence, the Court will easily be able to judge the sort of dominating personality possessed by Mr. Banks and to understand that the E. J. & E. R. R. under his presidency was not managed under anyone else's domination and control. The testimony of Mr. Scott Rogers, the present President [R. 77 and 119] is equally impressive on the point of the separate and inde-

pendent administration of the affairs of the Appellee. Men of such caliber are not selected to abdicate their functions or to be branch managers under central control.

(4) Directors' approval of contracts.

The Government alleged [R. 6] that the Steel Corporation requires all important contracts of the Appellee to be submitted to it, and that the terms of such contracts are generally prescribed by the officials of the Steel Corporation. Failing any such proof, the Government now makes a point of the fact that there was an annual blanket approval by the directors of the Appellee of all contracts. The evidence shows that contracts were never submitted to the officials of the United States Steel Corporation for approval in advance of their execution. [R. 121.]

(5) Location of offices and division counsel.

The reference to such matters indicates the straits to which the Government is reduced.

(6) Meetings of presidents.

Nothing was ever discussed at these meetings with relation to the operation and management of the railroad, and nothing in the nature of directions was given to the Appellee's President. [R. 119.]

(7) Control of capital expenditures.

Appropriations for capital expenditures in excess of $5,000 or $10,000 alone were submitted to the Steel Corporation. No expenditures for maintenance were submitted or so much as discussed. [R. 45.] Defendant's Exhibit 27 [R. 414] shows that from the years 1926 to

1930 inclusive the total expenditures, both for maintenance, operation and capital account were $88,363,371.38. Of that amount $3,153,817.36, or 3.57% was expended on capital account on the recommendation of the United States Steel Corporation, except, as frequently happened, the money was actually spent or the contracts for its expenditure entered into before the recommendation was given. [R. 34, 52, 123.] Certainly, a stockholder may be consulted to that extent on capital expenditures without a surrender or abdication by the subsidiary.

(8) Control of surplus funds; the advance account.

That caption is misleading. The United States Steel Corporation had no control of the surplus funds of the Appellee. The Government tries to spell out such control from the fact that the Appellee does deposit surplus funds from time to time with the Steel Corporation, the same as it would with a bank, and when it wishes to use the money, draws a draft, and the suggestion is that the Steel Corporation would not be obliged to honor the draft. Of course there was never an instance of a refusal to honor a draft. The United States Steel Corporation merely acts as a depositary. The relation of debtor and creditor is created. The corporation's own deposits in banks are always greatly in excess of any of the deposits of the Appellee, and the Steel Corporation paid interest to the Appellee in excess of the amount it itself received on its own bank deposits. [R. 60, 71.] The purpose of the deposit is plainly shown by the fact that during the depression, from January 1, 1930, to January 1, 1934, the deposit was reduced from approximately $12,200,000 to approximately $965,500 [R. 71], "to be used for the running expenses of the road."

(9) Control of the clearing of inter-subsidiary transactions.

This was a clearing device to save red tape and expense by which the Steel Corporation served as a clearing house for the settlement of accounts between subsidiaries, the correct balance being credited or debited as the facts might warrant. [R. 34.] It has nothing to do with transportation charges or traffic claims. [R. 59.] It serves to prove the complete separation of the affairs of each company from the others by using the clearance account. The subsidiaries, including the defendant, are not made agents, instrumentalities, departments or branches of the Steel Corporation any more than banks or brokerage houses, which employ similar methods, become thereby mere agents, instrumentalities, departments or branches.

(10) Bonus, pension and stock purchase plans.

The United States Steel Corporation does give to the Appellee's officers and employees an opportunity to purchase stock of the Steel Corporation upon a deferred payment plan. It does give the employees of the Appellee the benefit of a profit-sharing plan adopted by the stockholders of the Steel Corporation.

There is a Pension Fund owned and administered by a non-stock corporation, not a subsidiary of the Steel Corporation [R. 57], and additional sums are contributed to the earnings of that Pension Fund to make up an amount each year for the payment of pensions to the retired officers and employees of various subsidiaries of the United States Steel Corporation, including the Appellee, but the latter contributes whatever sum is needed for its own retired employees and officers in addition to

the amount received for them from the earnings of the Pension Fund. [R. 57.]

Surely, these are all appropriate matters to consult the stockholder or stockholders about, and the laws of many States require the approval of the stockholders on such matters.

(11) Reports, budget estimates, intersubsidiary purchases and bank accounts.

It is true that certain reports, budget estimates and copies of contracts are submitted to the Steel Corporation solely to the end that it may be informed of the activities of its subsidiaries, not, as the Government says, so that it may supervise the activities of the Appellee, but so that it may have information which is proper for a stockholder to have. No evidence of supervision is cited, and there is none. Copies of contracts are not furnished by the Appellee until after they have been entered into, and then only for statistical purposes. [R. 70-71.]

The statement on page 76 of the Government brief that purchases by the producing companies are supervised by the Purchasing Agents' Committee of the Steel Corporation is significant. There is no evidence and no claim of any supervision of the purchases made by the Appellee. The Government investigators, in combing the Appellee's records and files of thirty years, found a letter by Mr. Banks to Mr. Farrell complaining of an advance in the price of coal. He was evidently angry when he wrote the letter, and said some things which he had to admit were not so. [R. 102-103.] The Government says at page 75 that Mr. Banks repudiated the statements. They were to the effect that the railroad sold its scrap to the

Illinois Steel Company at a price fixed by the latter, although it could get a better price from outsiders, and it had no means of making savings either in sales or purchases.

It was conclusively established by uncontradicted evidence that it made its purchases in its own discretion and solely in its own interest, even buying coal from independent mines on its line to keep them going, so as to get their traffic, although it was able to buy a uniform high grade coal in solid trainloads from subsidiaries of the Steel Corporation at lower prices. [R. 415, 73-74, 97-98.] It was also likewise established that the Appellee sold its scrap to the Illinois Steel Company or outsiders, depending entirely on which offered the best price. [R. 99.]

The purchase of coal and the sale of scrap are but two of the very many incidents relied on by the Government, which, when the facts are understood, demonstrate the complete independence with which the affairs of the Appellee are administered in its own interest.

As to the supervision of bank depositaries or bank balances, the undisputed evidence is that the Steel Corporation exercises none whatsoever. [R. 54-55.] The most that it does is to advise when it's advice is asked as to the safety of particular depositaries, since it is in a better position to judge. [*Id.*] That again serves to demonstrate the absolute separate and independent administration of its affairs by the Appellee. If it were a mere branch, department, instrumentality or agent, it would receive directions. It would not seek advice, as it might seek it from anyone.

(12) Trackage agreement with the Chicago and Eastern Illinois Railway Company.

This matter was obviously introduced for the sole purpose of creating atmosphere, since it is irrelevant to any issue in the case. As stated in the Government brief on page 79, the C. L. S. & E. R. R. Co. which leased its road to the Appellee in 1909, had a trackage agreement with the C. & E. I. R. R. Co. (not a Steel Corporation subsidiary), whose terms were presumably satisfactory to both parties. In 1922, being in receivership, the C. & E. I. R. R. Co. was able to disaffirm its contract. It did so, and demanded a higher rental on the ground that its labor and other expenses had greatly increased. A new agreement was negotiated between Mr. Banks and Mr. Jackson representing the C. & E. I. R. R. Co. [R. 40, 41.] Naturally, each tried to make as good a bargain as he could. This was one of the two contracts negotiated by Mr. Banks over a period of thirty years, on which he consulted Judge Gary before the contract was closed. [R. 62.]

So far from showing domination and control by the Steel Corporation, this transaction demonstrates the contrary.

The C. & E. I. succeeded in getting an increased rental of 2¢ a ton. [R. 41.] There is nothing to show whether the new rental was fair or not, but that is wholly immaterial. Under it the Appellee had the entire haul and paid the C. & E. I. rental for the use of its tracks. There is nothing in the record to show the cost of operating the trains. Without an agreement, if the traffic had moved over the same route, each of the parties would have received for its part of the haul a division of the rate. There is nothing to show how the results to the Appellee

under the two methods would have compared. Judge Gary's only part in the transaction was to advise Mr. Banks that if it was more convenient for him to remain as he was, he better pay the increased rental demanded, rather than to transfer to the Terre Haute [R. 41], although the latter was willing to give trackage rights for what the C. & E. I. had theretofore been receiving. [R. 40, 41.]

(13) Lease of the Chicago, Lake Shore and Eastern Railroad Company.

This matter has as little relevancy as the last, and is obviously introduced for the same purpose. This was the other of the two contracts made over a period of thirty years, that was discussed with the officials of the Steel Corporation before it was executed. [R. 62.] We again emphasize the fact that Judge Gary, who had been opposed to making the lease on legal grounds, on grounds of policy, and "also justice between the different parties," would not discuss the matter at all until the Presidents of the companies involved had agreed and counsel had approved. [R. 135.]

The Government's purpose is to insinuate that the C. L. S. & E. had been receiving divisions in excess of what it should have received for the services rendered. So the Interstate Commerce Commission had said in its *ex parte* report made in 1904. In its report to the Congress in 1905, submitting what became known as the Hepburn Bill, it asked for jurisdiction over such matters. The Congress gave it by Section 15 (13) of the Act at the same time that it passed Section 1 (8), the Commodities Clause. The lease to the Appellee was not made until

June 1, 1909, three years later. [R. 365.] Thereupon, of course, the rates and divisions of the Appellee became the rates and divisions for the entire system operated by it. The former rates and divisions of the C. L. S. & E. were superseded. If they had been excessive, that was the fault of the Interstate Commerce Commission certainly after the passage of said Section 15 (13) of the Interstate Commerce Act in 1906. The question whether they had been excessive or not is not now before this Court and has no relevancy to any question in the case. The Appellee was in no way involved, and it would be of no importance in this case even if it had been. In its special report to the Congress in 1915, quoted at page 30, *supra*, the Interstate Commerce Commission said:

> "The Commission comes into constant contact with the records and accounts of railroads and other public carriers through its Examiners of Accounts, and has reason to believe that there is no basis for the allegation that wholesale rebates have been paid to the Steel Corporation during the period of six years mentioned in the resolution."

The complete answer to all that the Government has to say under this head is that if the C. L. S. & E. received divisions and allowances in excess of the value of the services rendered, the Interstate Commerce Commission had authority to determine "what is a reasonable charge." (Sec. 15 (13).) So far from indicating that the case is within the Commodities Clause, it proves the contrary.

Conclusion.

This case is founded on a Statute. That Statute is directed toward the manner in which common carriers perform their common carrier functions. It is not directed in any way to such matters as election of officers, declaration of dividends, or reports made to stockholders, or any similar matters. The evidence and the findings show that the Appellee in this case has managed its business, and has performed all of its functions bringing it into relation with the public, not only independently, but in a manner in strict conformity with the law.

Yet the Government is asking that this Court draw a conclusion from the incidents we have briefly referred to above, directly contrary to the conclusion of the District Court when that Court said:

> "But no single piece of evidence taken alone, nor all taken together and considered as a whole, warrant the inference that the defendant, and the producing and manufacturing subsidiaries are under the domination, control, direction and management of the Steel Corporation in the sense that the defendant and the other subsidiaries are mere departments, branches, adjuncts and instrumentalities of the Steel Corporation. The evidence fails to show that the defendant had any interest, direct or indirect, legal or equitable, in the articles or commodities which it transports for the subsidiaries of the Steel Corporation." [R. 511.]

IV.

Answering the Government's Point III, the Appellee Makes But Few If Any of the Contentions Which the Government Purports to Answer Under This Point.

The Appellee does not contend that it is not a railroad within the meaning of the Commodities Clause, or that industrial railroads are beyond the reach of the Commodities Clause.

The Appellee does contend that it did not mine, manufacture or produce the commodities transported by it, that they were not produced under its authority and that it does not own them or have any interest in them, direct or indirect.

The Appellee does not contend that Section 15 (13) is determinative of this case. It merely contends in that regard that it is very persuasive evidence, reenforcing what otherwise plainly appears, to show that the Commodities Clause was not intended to prohibit transportation by a railroad of the products of a proprietary industry.

We will discuss the sub-heads of the Government's Point III in the order stated:

A. Character of the Service

The Government says that Appellee is not an industrial or terminal railroad. Of course the case is not to be decided on terminology, but the Appellee is what the Interstate Commerce Commission defines an industrial railroad to be, *i. e.* "an incorporated or unincorporated railway controlled by some manufacturing or mining industry, the major portion of whose traffic is furnished

by the controlling company." The Commision said that there were 449 such roads "which derived revenue from divisions of through rates or allowances by carriers". (24th Annual Report of Interstate Commerce Commission, 1910, p. 33). To enjoy divisions of through rates such roads obviously must have a common carrier status.

The recommendation of the Commision in its 19th Annual Report of 1905 (p. 10) on which Section 15 (13) of the Hepburn Act was adopted, is headed "Terminal Roads, Elevator Charges and Private Cars."

Whether a railroad is a terminal road depends on the service it renders, not on the number of its employees or the amount of its equipment or on the number of trunk lines with which it connects. An interchange service between manufacturing plants and trunk lines is certainly a terminal service. The fact that the Appelle is a belt line around a great center connecting with all of the trunk lines entering it does not change the character of its service, or affect its status as a terminal road. We do not say that that permits it to violate the Commodities Clause, but we do say that the service performed by it is precisely the kind of service naturally to be performed for an owning industry, which the Statute was not intended to prohibit.

We agree that the Appellee is a common carrier—so were the 449 industrial railroads said by the Interstate Commerce Commission, as above stated, to be enjoying divisions of through rates. Whether it has an interest in the products transported by it does not depend on whether it conects with one or more trunk lines, or serves one or more manufacturing plants. To perform an interchange service between the trunk lines and manu-

facturing plants, like those of the Steel Corporation subsidiaries, about the City of Chicago, and to serve those who have the right to demand and receive its service, it must have adequate road and equipment to render the service, but it is in no different position with respect of its right to transport the products of a proprietary industry than it would be if it served but one plant and connected with but one trunk line. The question before the Court is to be decided on other grounds.

We do not say that the character of the service is determinative of the question at issue. The Congress made the ownership or interest of the railroad in the commodity transported the determinative question. All we say on that subject is that it is the kind of service that the framers of the Commodities Clause expected industrially owned railroads to perform for the owning industry. Whether the Pennsylvania Railroad, if owned by the Steel Corporation, could transport the products of the latter's producing subsidiaries is not before the Court. We think it could under the Statute as it now stands. No doubt the Congress took into consideration the kind of railroads likely to be owned by industrial companies, *i. e.* roads to reach the trunk lines, when it passed the Commodities law. If the Steel Corporation undertook to acquire the Pennsylvania Railroad now, the Congress would be likely to have something to say about it.

The Government says that by excepting "timber and the manufactured products thereof" the Congress intended to include all other products and that the Appellee is asking the Court to make another exception. Undoubtedly the Congress did intend to include all of

the products not excepted, and the Appellee is not asking this Court to extend the exceptions. By it the Congress enabled any railroad to engage in the lumber business, so this Court has said. (*Tap Line* Cases, 234 U. S. 34).

We do not say that the Appellee could engage in manufacturing and then could transport the products of its manufacture.

B. Manner of Appellee's Affiliation With Producing Subsidiaries.

Under this head the Government seems to have abandoned its Point I, for it says, (p. 116):

> "The Statute does not specify what constitutes an 'interest, direct or indirect'. It does not make 'interest, direct or indirect' turn upon stock ownership. It does not mention stock or stock ownership at all. * * * The decisions of this Court make it clear that stock ownership is not significant in and of itself in determining whether the forbidden interest exists."

On page 117, referring to the Commodities Clause cases in this Court, it says:

> "These cases do not turn upon stock ownership as such, but upon the factual relationship of the railroad company to the owner of the commodities."

It argues that the instant case will not be controlling in other cases, because each will have to be decided upon its own facts. It now concedes (p. 119):

> "In the case of a common carrier railroad company whose stock is owned by a producing company, mere stock ownership would not create the

forbidden interest in the commodities of the producing company."

Yet it contends that stock ownership one step removed from production brings the case within the Statute. It says that the Statute does not mention stock or stock ownership at all. Counsel evidently overlooked the fact that the rejected Tillman amendment did say something about stock ownership, and did make the "interest, direct or indirect" turn on stock ownership, either of a railroad in an industry, or of the industry or its owners in the railroad.

The Government says (p. 117) that this Court stated in the *Lackawanna* Case (238 U. S. 516, 528):

> "The common ownership by individuals of a substantial portion of the stock of a railroad company and of a producing company would not in and of itself create the requisite interest in the commodities of the producing company",

and that the forbidden interest that was found to exist in that case was not the result of stock ownership, but resulted from the sales contract. Quite true, but we say that this Court not only stated, but decided in that case that common ownership of stock of the railroad and the producing company did not in and of itself create the prohibited interest. The District Court had dismissed the bill on that precise ground. The common ownership of stock in that case resulted in a "common management" [*Id.* p. 526]. The same officers were elected for the coal company as for the railroad, and thus having a common management, entered into a contract which this Court decided gave the railroad an interest in the coal

transported, but that was because of the terms of the contract itself, and not because of the fact that it was entered into between two companies having a common ownership and a common management.

The Government seems to claim that there is a distinction between common ownership by individuals and a holding company, but the incidents of such common ownership, which it says necessarily results from the real nature of a holding company, was found to have existed in that case as a matter of fact. Yet this Court held that that did not bring the case within the Statute. Whereas, the fact in the instant case is that common management did not result from the ownership of the stock of the railroad and of the producing companies by the Steel Corporation. The management of the railroad was kept separate and distinct from that of the Steel Corporation itself and of its producing subsidiaries. That case involved a trunk line railroad.

Manufacturers R. Co. v. United States, (246 U. S. 457) involved a terminal railroad which was owned by the owners of an industry. The question of its right to divisions and allowances on proprietary traffic was involved. It was a smaller terminal railroad than the Appellee, but it served to connect an industry with the trunk lines. Apparently the Commodities Clause was not even referred to. The product involved was beer, not as in the *Tap Line* case, lumber.

After answering many of the Appellee's supposed contentions by maintaining that the case turns on the facts and not on stock ownership as such, the Government brief finally does swing back to its Point I, and it does state on page 117 that according to the *Reading* case, in the

Government's view the case is to be decided "not upon the fact of stock ownership as such, but upon the peculiar nature of a holding company, the very purpose and function of which is to reduce its subsidiaries to its mere agents, departments, or instrumentalities." In other words, in its last analysis the Government's case comes down to this, that as a matter of law, the purpose and function of a holding company is to reduce its subsidiaries to its mere agents, departments and instrumentalities.

The Congress has not yet so legislated, even if it have the Constitutional power to do so, and the findings in the instant case establish the contrary. In short, the Government asks this Court to hold, as a matter of law, that a situation exists which the evidence and the findings establish did not exist as a matter of fact.

The Appellee does not make the contention which the Government says was rejected by the Court in the *Delaware & Hudson* case, but in view of the fact that the Government now bases its case on the nature of a holding company, it is interesting to observe that as late as 1930 the Interstate Commerce Commission held it to be for a lawful purpose and compatible with the public interest for the Delaware & Hudson Railroad Co. and the Delaware & Hudson Coal Co. to change its corporate structure by transferring the railroad to a new company, thereby leaving the Delaware & Hudson Co. merely a holding oompany. (158 I. C. C. 615). In the same year it also held that it was for a lawful purpose and compatible with the public interest for the Upper Merion & Plymouth Railroad Co. to issue new stock to be sold at par to the Alan Wood Steel Co. which owned the stock of the railroad company and the stock of a coke company. (166 I. C. C. 351.)

C. Section 15 (13) of the Interstate Commerce Act.

Appellee has contended in this brief that the Commodities Clause prohibits a railroad company from transporting commodities (except lumber, etc.) when the commodities are "produced by it or under its authority, or which it may own, in whole or in part, or in which it may have an interest", and that no railroad company is prohibited by the Commodities Clause from transporting any commodity unless such commodity is produced, etc. by such railroad company. In other words, Appellee has contended that the meaning of the clause is to be determined from its language.

The Government, on the other hand, has contended that the Clause prohibits a railroad company from transporting commodities which it has not produced, etc. if the shipper of the commodities owns the commodities and owns the stock of the railroad company which transports them or at least if a holding company holds the stock of the railroad company and of the producing company.

Appellee has contended that to give the Commodities Clause the meaning asserted by the Government would make it prohibit what Section 15 (13) of the Interstate Commerce Act recognized as perfectly proper. The Commodities Clause and the regulatory section, Section 15 (13), having been passed at the same time and as a part of the same Act, the inference is obvious and very strong that the construction contended for by the Government cannot be the true construction.

The Government recognizes the persuasive force of the argument. It does not attempt to controvert the logic or the legal principle upon which Appellee relies. It at-

tempts to meet the argument by asserting that Section 15 (13) does not mean what the words of the Section convey, and what Appellee has construed it to mean.

For convenience we restate here Section 15 (13). It is as follows:

> "If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Appellee understands that Section 15 (13) gives to the Commission jurisdiction to determine what is a just and reasonable charge which a carrier should pay when a shipper furnishes any transportation services, and that this jurisdiction covers the service which a shipper furnishes when he supplies a switch track which connects his plant with a carrier; and also when he owns the stock of an incorporated common carrier which transports his shipments from his plant to another carrier.

The language of Section 15 (13) is amply broad to convey the power we have stated.

The Commission, when it reported to Congress an amendment to the Interstate Commerce Act, which was

adopted and became Section 15 (13), clearly intended that the section should have that meaning. This is made clear by the language in which the Commission recommended the adoption of the section (Commission's Annual Report for 1905, p. 10) referred to in Government's brief, page 122, and quoted more fully in this brief, page 19.

Finally, the true meaning and purpose of Section 15 (13) was determined more than twenty years ago in the case of *O'Keefe v. United States*, 240 U. S. 294.

The New Orleans, Texas & Mexico Railroad Co. operates directly and through stock ownership of other companies, a system of railroads extending from New Orleans, across the States of Louisiana and Texas (p. 298).

The Louisiana & Pacific Railway Co., incorporated under the laws of the State of Louisiana, owns and operates a Tap Line within that State, including about 80 miles of main and branch lines. It crosses and connects with the New Orleans, Texas & Mexico Railroad. It also connects with five other trunk lines (p. 298).

The Louisiana & Pacific is like the Elgin, Joliet & Eastern Railway Co. Located along its line are lumber mills, as steel mills are located along the line of the Elgin, Joliet & Eastern. The same interests own the lumber mills and the stock of the Louisiana & Texas, just as the United States Steel Corporation, through stock holdings, owns the steel mills along the line of the E. J. & E. and also the stock of the E. J. & E. (p. 298).

The Interstate Commerce Commission entered an order requiring the New Orleans, Texas & Mexico to reopen through routes and publish joint rates with the Louisiana

& Pacific. The order prohibited the New Orleans, Texas & Mexico from making an allowance or division to the Louisiana & Pacific out of the joint rate in excess of certain prescribed amounts (p. 295).

The amounts of allowances or divisions which the New Orleans, Texas & Mexico was permitted to make to the Louisiana & Pacific by the order were so small that the New Orleans, Texas & Mexico got none of the business of the Louisiana & Pacific. The Louisiana & Pacific could, under the terms of the order; exchange its traffic with other trunk lines with which it had connections, and get greater allowances or divisions than it could get from the New Orleans, Texas & Mexico (pp. 299, 300). Therefore, O'Keefe, the Receiver of the New Orleans, Texas & Mexico filed a bill to annul the order of the Commission (p. 295) on the ground that the Commission was without power to prescribe the maximum divisions, as was done by the order referred to (p. 300).

The Court held that the Commission clearly had the jurisdiction to make the order (p. 302). The Court quoted Section 15 (13) as giving the Commission the authority to make the order, and then said:

> "In the case of 234 U. S. 1, this court did not ignore, but fully recognized the significance of the community of interest between the lumber company and the tap line. It was pointed out (p. 27) that timber and its manufactured products were exempted from the absolute prohibition of the commodity clause of the Hepburn act (of June 29, 1906, chap. 3591, 34 Stat. at L. 584, 585, Comp. Stat. 1913, sec. 8563). But this was regarded as one of the circumstances rendering it important that the Commission should deal with the abuses found to exist

in the division of joint rates with the tap lines, not by abolishing them altogether, but by 'reducing the amount so that a tap line shall receive just compensation only for what it actually does.' So, in Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. ed. 83, 87, 32 Sup. Ct. Rep. 22, the court said: 'The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in sec. 15: the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum.' Again, in Ellis v. Interstate Commerce Commission, 237 U. S. 434, 445, 59 L. ed. 1036, 1041, 35 Sup. Ct. Rep. 645, it was said: 'The intervening corporation may be a means by which an owner of property transported indirectly renders the services in question, and in that event its charges are subject to the Commission by sec. 15.'"

That case was decided in 1915. Sub-section 13 was the only provision of Section 15 under which the order could have been made. The Act of 1920 for the first time empowered the Commission generally to establish divisions between carriers on complaint or on its own initiative. The first part of the Section (1) which the Court quoted did not provide for divisions of rates as between carriers but only for the case where the rate whether "individual or joint" was found to be unjust, etc.

In the *Manufacturers Railway Co. v. United States* (246 U. S. 457) decided in 1917 this Court in reviewing an order requiring the trunk lines to re-establish divisions

with an industrial common carrier said it might have dealt with divisions in the same order, citing the *O'Keefe* case. (p. 480.)

It is true that the Commission has not always been consistent. As this Court said in *I. C. C. v. Diffenbaugh*, (222 U. S. 42, 45), after the passage of the Act of 1906, "the Interstate Commerce Commission had begun to change its view upon further reflection." Indeed, it seems to have changed its mind a number of times. It has often said that Section 15 (13) authorized switching allowances to the shipper only, but in practice it has more often approved of divisions with industrially owned common carriers. (See *supra* p. 32.) It has attempted to treat such common carriers as mere plant facilities, but this Court decided in the *Tap Line Cases* (234 U. S. 1), that a common carrier for one purpose was a common carrier for all purposes.

It has tried to make a distinction between divisions and allowances which this Court in the Manufacturing Ry. Co. just above cited referred to as "abstruse distinctions". (246 U. S. 482.)

But regardless of all else, it is difficult to understand how the Government can say, in the face of the *O'Keefe* case alone, as it does in a note on page 130, "we have been able to find no case in which th Commision or the Courts have held that Section 15 (13) authorizes or regulates allowances to an industrially owned or other common carrier."

D. Legislative History.

The point here to be noted is the Government's misapprehension of the affect of the exemption of lumber and the manufactured products thereof. It says that that shows an intention of Congress that the Commodities Clause should apply to transportation by all industrially owned railroads of the products of affiliated industrial corporations, except in the case of the lumber industry.

What it shows is that the Congress intended to permit railroads to engage in the lumber business, *i. e.* to transport their own lumber. We do not maintain that any railroad, industrially owned or not, may transport any other products which it has produced, owned, or in which it has the prohibited interest.

E. Construction by the Attorney General.

The idea here seems to be that whilst the Commodity Clause does not prohibit the industrial ownership of railroads, it does prohibit railroads so owned from transporting the products of the owning industry.

Since a majority of the traffic of industrial railroads as defined by the Interstate Commerce Commission is proprietary, it is difficult to see how the prohibition of such traffic could fail to destroy the relationship. Manifestly there would have been no point whatsoever in the various recommendations of the Attorneys General referred to if the Commodities Clause already prohibited transportation by a railroad of the products of an owning industry.

Conclusion.

It is respectfully submitted that the decree of the District Court should be affirmed.

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